Supreme Court, U. S.
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No. 80-422

IN THE

Supreme Court of the United States

October Term, 1980

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and HELEN O'BANNON,

Appellees

On Appeal From the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS

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ARGUMENT

Because most of the issues raised by the Motion of Appellees to Dismiss were anticipated in the Jurisdictional Statement, this brief will be limited to clarifying a few points which are central to the issues presented:

1. Appellants challenge the Department's Regulation 9421.74(q) because it forbids payment for inpatient hospital care which is necessary because there is no nursing home bed to which the patient can be transferred. Appellants do not maintain, as suggested at page 9 of the Motion, that a hospital is entitled to payment, in every case, for as long as the patient remains in the hospital.

2. The Motion suggests (page 18) that a state may receive federal financial assistance to pay a hospital for overstay care only if that hospital operates a separate nursing home facility. This is true *only if* payment is to be made at a nursing home rate. Federal financial assistance is, however, available to pay a hospital for custodial care at the inpatient hospital rate whether or not that hospital operates a nursing home. Moreover, because a hospital is paid for all inpatient days at its average per diem cost, a hospital must be paid for the overstay days at the full inpatient rate, if it is to be paid the total cost of all of its inpatient care. (See Jurisdictional Statement, p. 11, fn. 13).

3. The Motion attempts to distinguish *Monmouth Medical Center v. State of New Jersey*, 80 N. J. 299, 403 A. 2d 487 (1979) by pointing out that the specific New Jersey regulation challenged there made no provision for payment to a hospital-based nursing home. There is, however, no effective difference between that case and this

because New Jersey, like Pennsylvania, pays for care in hospital-based nursing homes.

4. The Motion attempts to justify Regulation 9421.74 (q) on the ground that overstay patients are not receiving care from a certified provider. This is not so. Even though the patients' condition would permit a lesser level of care, they are receiving inpatient hospital care from a certified hospital. These overstay days are counted in determining the per diem rate which the hospital receives for all of its patient days.

5. Most importantly, appellees studiously ignore that their Regulation 9421.74(q) precludes payment for medically necessary inpatient care [1] which hospitals are required to provide. Thus, they ignore the central issue which this Court has not resolved (*see Beal v. Doe*, 432 U. S. 438, 444 (1975)) and which has been the focus of discussion of the other courts which have wrestled with this problem.[2]

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1. This holding in prior litigation between Temple University and the Department is binding on appellees. *Commonwealth of Pennsylvania, Department of Public Welfare v. Temple University—Of the Commonwealth System of Higher Education*, 21 Pa. Commw. Ct. 162, 166, 343 A. 2d 701, 704 (1975).

2. In addition to the cases cited in footnote 12 at page 10 of the Jurisdictional Statement, two recent decisions of the Fifth Circuit have applied a standard based on medical necessity. *Curtis v. Taylor*, 625 F. 2d 645 (September 11, 1980) and *Rush v. Parham*, 625 F. 2d 1150 (September 15, 1980).

CONCLUSION

For the reasons stated in the Jurisdictional Statement and herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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